

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

634

Brief for Appellant

United States Court of Appeals For
The District of Columbia Circuit

No. 22,923

UNITED STATES OF America

Appellee

v.

Ronald S. GREENE

Appellant

Appeal from a Judgment of the United States
District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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STATEMENT OF QUESTIONS INVOLVED

The principal issues presented for review in this case are:

1. Was the summons as issued by Detective Wesley to summons the defendant to a meeting in the U.S. Attorney's office at the Court of General Sessions an arrest?

The Trial Court said: No.

Appellant answers: Yes.

2. If the summons and the resulting meeting constituted an arrest was it an unlawful arrest?

The Trial Court concluded: No.

Appellant answers: Yes.

3. Was the in court identification of the defendant based upon an identification made at the U.S. Attorney's office pursuant to the summons?

The Trial Court said: Yes.

Appellant agrees: Yes.

4. Was the identification of the defendant at the U.S. Attorney's office the product of an unlawful arrest?

The Trial Court said: No.

Appellant answers: Yes.

5. Was the in court identification of the defendant the product of an unlawful identification made in violation of the defendant's rights?

The Trial Court said: No.

Appellant answers: Yes.

6. Was it error to permit witness Harper to testify in court concerning this out of court identification of the defendant?

The trial court said: No.

Appellant answers: Yes.

7. Was there sufficient evidence before the court without Mr. Harper's identification to submit the case to a jury?

The Trial Court did not answer this question.

Appellant answers: No.

This case has not previously been before the Court, under the same or any other title.

REFERENCES TO RULINGS

Oral opinion of trial court on pre-trial motion to suppress.

(T.128-129)

STATEMENT OF CASE

This case arises from notice of appeal, timely filed, by appellant, Ronald S. Greene, who was found guilty on four counts: One count for robbery of \$150.00 in value; three counts of assault with a dangerous weapon, a pistol, by a jury following a plea of not guilty. A fifth count of robbery was dismissed by the U.S. Attorney prior to swearing the jury. Defendant's pretrial motion to suppress out-of-court identifications of the defendant was denied as was a similar motion raised in a timely fashion during the trial. Motions for a judgment of acquittal were denied by the trial court at the end of both the prosecution's case and the defense's case. On February 28, 1969 the defendant was sentenced under 18 U.S.C. Section 5010 (b) with a possible incarceration of up to six years. Motions for bond pending appeal were denied on the grounds that the defendant had been convicted of a violent crime aggravated by the use of a pistol, that the defendant would pose a threat to the community, that he was then unemployed and without a means of supporting himself and that the defendant had failed to appear in court once while on personal bond pending trial. Appellant has been permitted by the District Court and by this Court to proceed on appeal in forma pauperis.

SUMMARY OF ARGUMENT

Detective Wesley suspected defendant, Ronald S. Greene, had been a participant in the robbery of Real Cleaners on Good Hope Road on December 1, 1967. (The entire record of proceedings misspells the defendant's surname by adding an extra "e" at the end: T.71) He realized he did not have sufficient probable cause to obtain a warrant for Green's arrest without an identification by at least one of the witnesses. (T.16) The witnesses could not make an identification of Green from photographs (T.8,34,433 & 434) so he arranged for two witnesses to view the defendant at his office in the Court of General Sessions. (T.11) To be sure Mr. Green would appear for this purpose, Detective Wesley summonsed him and a fellow suspect to the same office at the same time. (T.11) At this time Mr. Harper identified Mr. Green as the perpetrator of the acts and Detective Wesley then obtained his arrest warrant immediately thereafter. (T.15)

Appellant contends Mr. Green was thus subjected to an unlawful arrest, by compelling his appearance in the Courthouse, and improperly subjected to an out-of-court identification without benefit of counsel. There is no question that had Mr. Green been formally charged at the time of this out-of-court identification he would have had the right to an attorney, and that attorney's presence at the identification proceeding. The detective sought to avoid the individual's rights by not formally charging him until after the identification by Mr. Harper even though compelling Mr. Green's attendance in the Courthouse. The detective had in fact, and as a

matter of law, restricted Mr. Green's liberty and arrested him. Once under arrest Mr. Green was entitled to the proper warning of his rights and the presence of an attorney during any identification proceeding. Counsel having been thusly denied him at that critical stage the identification should have been suppressed, as asked, at the trial. The trial court erred in not suppressing the identification and the case must, therefore, be reversed.

ARGUMENT

A. Facts:

On Friday, December 1, 1967, between the hours of 7:30 and 8:00 p.m. three people, Mr. Edgar J. Harper, Mrs. Fannie J. Prioleau and Mrs. Lei Lani Jackson were working at the Real Cleaners, 1319 Good Hope Road, Southeast, Washington, D.C. Mrs. Prioleau was working in the rear part of the dry cleaning establishment; Mrs. Jackson was out in the front of the store with Mr. Harper who was at the cash register counting the days receipts. Someone came in then and announced that he was holding up the establishment. The thief escorted Mr. Harper and Mrs. Jackson to the rear of the store. (T.152) The lighting in the front of the store was described as very good. (T.153) The lighting at the rear of the store was described as dimmer, with fewer lights on than in the front of the store. (T.179) The thief then ordered the three store attendants to lie down at the rear of the store. While they were lying down Mr. Harper was relieved of his wallet and watch. While they were thus occupied at the rear of the store, Mr. Harper heard another individual at the front of the store tampering with the cash register. (T.157) Thereafter the thief made the three witnesses enter the mens room at the rear of the store, where they remained until Mrs. Jackson's husband entered the store. (T.157) The police were then called. Mr. Harper gave the description of the thief to the police. (T.157) On December 12, 1967, police Sgt. George R. Wesley, assigned to the criminal investigation division of the 11th precinct, visited the Real Cleaners on Good

Hope Road to interview Mr. Harper, Mrs. Prioleau, and Mrs. Jackson. The detective first asked each for a more accurate description of the thief. (T.6) He then showed them photographs from two loose leaf notebooks containing approximately 150 pictures. Mr. Harper identified one picture from the two books which he said looked similar to the thief but he was not sure. Mr. Harper declined to make a positive identification of the thief from the photograph. (T.9) Mrs. Jackson and Mrs. Prioleau made no identification at all from the photographs. (T.433 & 454) The detective also claimed to have interviewed Mr. Jackson who advised him that Mr. Green had the same physical makeup as the taller of the two thieves fleeing the store. (T.10) Mr. Jackson declined to identify the thief from photographs presented to him by the detective. (T.34)

Since the witness could not make a positive identification from the photographs, Detective Wesley did not think that he had probable cause to make an arrest at that time. (T.16) Therefore, he decided to arrange an opportunity for the witnesses to see two of the men whom he suspected were the thieves. He summonsed Mr. Jackson and Mr. Harper to the office of the U.S. Attorney in the Court of General Sessions on a Saturday morning. He also summonsed the defendant and another individual who was known to be a friend of the defendant to be at the same office at the same time. (T.11)

As ordered and directed by the summons, the defendant, Ronald S. Green, appeared at the appointed hour in the U.S. Attorney's office at the court of General Sessions. (T.72) The defendant,

Green, was not informed why he was there and did not know if he had the right to refuse to appear, the summons having been issued. In fact, he was under the impression that he had been arrested and asked what the charge was. (T.74,377 & 381) He was not immediately advised that he was under arrest nor was he advised of the purpose of the summons. He simply was told in answer to his questions that he would find out what the charge was later. (T.74) While the defendant was in and around the U.S. Attorney's office at the Court of General Sessions pursuant to the summons (issued without probable cause) Mr. Harper made positive identification of Ronald Green as the thief who robbed the Real Cleaners on December 1, 1967. (T.63) Based upon this identification by Mr. Harper, Detective Wesley then placed the defendant Green under arrest. (T.15) Mr. Jackson, however, was still unable to identify Ronald Green as the thief. (T.41)

When the case came on for trial, the Government relied upon the identification of the defendant, Ronald S. Green, by Mr. Harper at the Court of General Sessions to prove the Government's case. While the Government called Mr. Jackson as well he testified only as to the general description of the thief. (T.207 & 212) Mr. Jackson did not identify the defendant, Green as the thief while at the Court of General Sessions and he did not identify him in court as the thief either. On the otherhand, Mrs. Prioleau and Mrs. Jackson, called by the defense, testified that they did not think Mr. Green was the thief who escorted them to the rear of the store. (T.433 & 454) After denying the defense motions for judgment of acquittal, the case was submitted to the jury. No exceptions were taken through the courts instructions to the jury.

B. Argument

The facts clearly demonstrate that when Ronald S. Green appeared at the Court of General Sessions in the U.S. Attorney's office he considered himself to be under arrest. When he asked what the charge was, he was advised that he would learn later. Were he not under arrest and free to leave the detective should have so advised him. By advising Mr. Green that he would learn the nature of the charge later, Detective Wesley confirmed that Mr. Green was in fact then under arrest. The record is clear that Mr. Green appeared only because he had been summonsed and did not know that he had the right to refuse to appear. Ronald Green understood that he was within the power of Detective Wesley and submitted in the consequence thereof.

As the defendant, Green, was arrested upon entering the Court of General Sessions on that Saturday morning one must ascertain whether the arrest was lawful in light of what was known at the time of the inception of the arrest. Clearly, Detective Wesley had absolutely no evidence to support his suspicions prior to Mr. Harper's positive identification in the U.S. Attorney's office. Detective Wesley, himself, realized that he did not have probable cause prior to that identification. Perhaps the detective intended to invite Mr. Green there of his own free will on the hope that Mr. Green would willingly comply for the sake of the administration of justice. However, that is not what the detective did and Mr. Green's appearance was not voluntary.

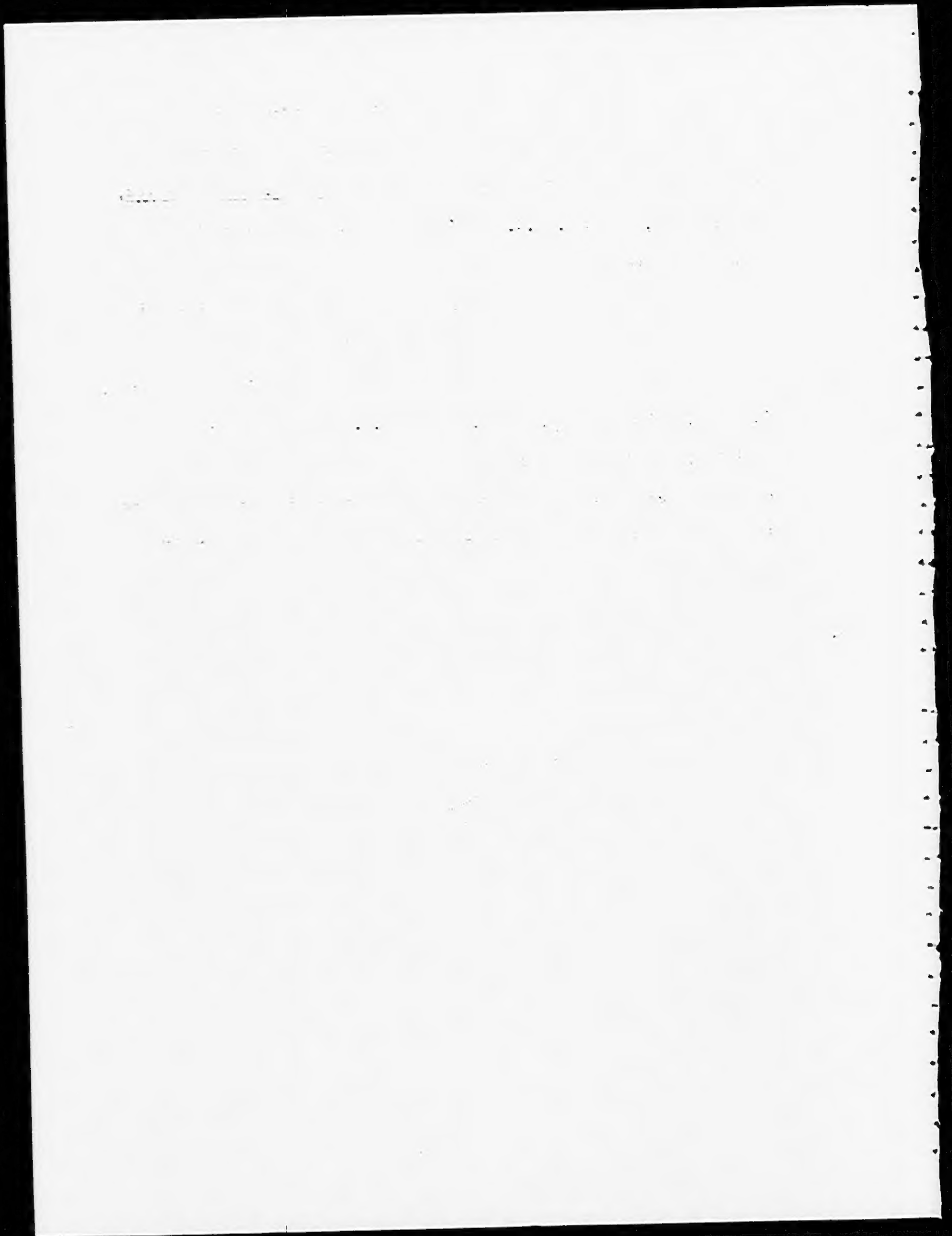
Mr. Justice Douglas, speaking for the Court in Henry v. United States, 361 U.S. 98, 4 L.ed. 2d 134, 80 S.Ct. 168 said that when police officers interrupted two men and restricted their liberty of movement the arrest was complete. The District of Columbia Court of Appeals in Coleman v. United States, 295 F.2d 555, 124 App. D.C. 133 (1961) held that an arrest is the seizing of a person and detaining him in the custody of the law. In Coleman the Court said that the term "arrest" may be applied to any case where a person is taken into custody or restrained from his full liberty, or where the detention of a person in custody is continued for even a short period of time. Arrest was further defined by the District of Columbia Court of Appeals in Kelly v. United States, 298 F.2d 310, 125 App. D.C. 46 (1961) wherein it was said that in order for there to be an arrest it is not necessary that there be an application of actual force, or a manual touching of the body, or physical restraint which may be visible to the eye, or even a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of one arresting, and submits in consequence.

The record makes it abundantly clear that the in court identification of the defendant, Ronald S. Green, was based upon an identification made at the U. S. Attorney's office. If the defendant Green's appearance at the U.S. Attorney's office constituted an unlawful arrest, as the appellant maintains it does, then the identification was the product of an unlawful arrest. The Supreme Court held in United States v. Wade, 388 U.S. 218, 87 S.Ct.

1926 18 L.ed. 20 1129 (1937) that an out-of-court identification proceeding supervised by the police was a critical stage of the criminal proceeding against any defendant and the defendant was entitled to have counsel present. The Supreme Court further said that it was not incumbent upon the defendant to show any other prejudice and that the mere fact that the defendant's attorney was not advised of the proceedings and was not present was grounds for reversal.

It is, therefore, absolutely clear that if defendant Green had had an attorney assigned to him on that Saturday at the U.S. Attorney's office in the Court of General Sessions either his attorney had to be notified of the identification or the identification by Mr. Harper suppressed. Defendant Green could not at that time afford his own attorney and did not bring one with him to the Court of General Sessions. The Government failed in its obligation to advise him of his rights and to advise him that he was then entitled to the appointment of an attorney. No attorney was appointed to represent him and none was present in his behalf during this identification proceeding. The only difference between the case at bar and Made is that in Made the defendant had been formally charged and an attorney had been appointed to represent him. In the case at bar the detective deliberately delayed advising the defendant of the charge, failed to advise him of his rights, and failed to see that an attorney was appointed to represent him at that critical stage of the criminal proceedings.

Since the defendant had been unlawfully arrested without probable cause all evidence obtained thereby should have been excluded from the jury's consideration. In Bynum v. United States, 262 F.2d 465, 104 App. D.C. 368 (1958) the Court clearly stated that the Government was entitled to no advantage whatsoever arising out of any unlawful arrest. An out-of-court identification has been held to be within that class of evidence which the Government may not enter into evidence if it was obtained improperly. (Adams v. United States, 399 F.2d 574, D.C. Cir. 1968) In addition, the Government should have established by clear and convincing evidence that the subsequent in court identification was in no way tainted by the out-of-court proceeding as required by Wade.



CONCLUSION

Appellant respectfully submits that the defendant was in fact and in law under arrest upon entering the Court of General Sessions pursuant to the Detective's summons. Therefore the defendant was entitled upon entering the Courthouse to have been advised of his rights and to be represented by counsel. The identification proceeding which immediately commenced upon his entry into the Courthouse was a critical, in fact the critical stage of the proceedings against him. The defendant should have been accorded the right to have an attorney represent him at that state and it was prejudicial error not to have done so. The identification made in violation of the defendant's rights, should have been suppressed and kept from the jury. Not to have done so is error requiring the setting aside of the jury verdict. The appellant respectfully prays this Court find it error not to have suppressed the out-of-court identification as being the product of an unlawful arrest and as being in violation of the rights of the defendant, Ronald S. Green and to set aside the verdict of the jury and to reverse the judgment of the trial court.

Respectfully submitted,

s/

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